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May 2, 2008

Corbin Davis, Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

BY FACSIMILE AND U.S. MAIL

RE: Proposed Rule Change to MCR 6.201

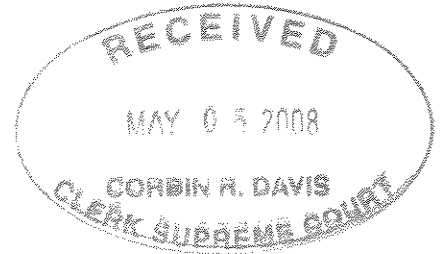
Dear Mr. Davis:

This letter is written regarding a proposed change to MCR 6.201. The change would eliminate the requirement that the prosecuting attorney provide the defendant with any exculpatory information or evidence known to the prosecuting attorney "only upon request." Let me indicate that I initially sent a letter to Chief Justice Cavanaugh about this very issue and the contradictory language contained in the Michigan Rules of Professional Conduct 3.8(d).

The language between the court rule and MRPC 3.8 are worded differently although they relate to the same type of information. MRPC 3.8 provides a prosecutor in a criminal case shall "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the degree of the offense..." MCR 6.201 on the other hand provides that the prosecuting attorney "upon request" must provide to each defendant any exculpatory information or evidence known to the prosecuting attorney. The court rule seeks to apparently remove the "upon request" language and then calls into question the necessity of the court rule in light of obligations imposed under Brady v Maryland, 373 US 83 (1963).

Let me state that I agree that any language that conditions the requirement to disclose exculpatory material by the prosecutor "upon request" should in fact be deleted from the discovery rule. Certainly any exculpatory information should be mandated to be provided in a separate rule. I do not ascribe to the policy that because the prosecutor is obliged to do it under Brady v Maryland, that that will in fact take place. My letter was triggered to Justice Cavanaugh based on my involvement and continued representation of Claude McCollum.

Those who have followed the McCollum case in the Lansing newspapers should be aware that Mr. McCollum in 2006 was convicted of first degree murder and first degree criminal sexual assault. His case was remanded to the circuit court where we were successfully able to have him released and the charges dropped because there was evidence that a video tape was in existence at the time of the trial that shows Mr. McCollum to be in another location at the time the homicide and sexual assault for which he was convicted occurred. This video tape information was never presented to



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the jury and the assistant prosecutor in that case alleged that he never knew of the existence of this video tape or other information until the day of trial. It should be noted a report was prepared approximately 11 months prior to the trial which indicated Mr. McCollum could not have committed this crime based on this video tape evidence.

What is astounding is that in the civil action now pending in the United States District Court in the case of Claude Zain McCollum v Bahl, Matwiejczyk, et al, Case No. 1:08-CV-96, one of the defendants, James Young has filed an answer to the complaint indicating at paragraph 101 of his answer to the complaint that he made the assistant prosecutor (Matwiejczyk) aware of his opinions of the whereabouts of Mr. McCollum at the time of the homicide no later than November 1, 2005. The trial in this matter commenced in late January of 2006. Jim Young further points out in his answer to the complaint in the federal lawsuit that he likewise advised the investigating officer of the existence of this exculpatory information. While the assistant prosecutor and detective dispute these allegations, the assistant prosecutor in a major homicide case should certainly be charged with knowing of all information and evidence as it relates to the investigation of this case.

Therefore let me indicate I would more be in favor of a court rule that provides notwithstanding Brady information which contains its own limitations of "otherwise not available to the defendant" a rule that simply provides that the prosecutor is required to immediately provide counsel for the defendant or the defendant proceeding in pro per any information that tends to be exculpatory in nature, irregardless of the form in which it is received, i.e., written report, DVD or other mass media storage document received, or even an oral report and information from no matter the source. I propose this because in the McCollum case the assistant prosecutor as well as the prosecutor Stuart Dunning made initial comments that they discounted the accuracy of the information prepared by James Young (actually he should be referred to as Sgt. James Young of the Michigan Department of State Police). It should not be up to the prosecutor or his subordinates to determine whether or not they believe the information in determining whether or not it is exculpatory. It should be their duty to present this information to the defendant and if it's presented to a jury to let a jury decide whether or not they believe the information as presented.

In this day and age of investigation of a prosecutor in one county for admittedly putting on perjured testimony in a trial, to prosecutors in another county making extrajudicial defamatory statements about a defendant prior to his retrial to the alleged misconduct of the prosecutor in the McCollum matter we should be more interested in having rules of conduct that are more inclusive of material to be disclosed as opposed to exclusive of

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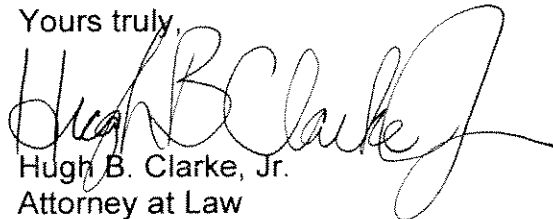
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the material to be disclosed. This expanded duty should apply irrespective of whether another constitutional requirement or ethics opinion exists.

Yours truly,

A handwritten signature in cursive script, appearing to read "Hugh B. Clarke, Jr.", written in black ink.

Hugh B. Clarke, Jr.
Attorney at Law

HBC/sjg